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No. 92-1727

In the Supreme Court of the United States

OCTOBER TERM, 1993

MADERA IRRIGATION DISTRICT, PETITIONER

v.

LAWRENCE F. HANCOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

PETER R. STEENLAND, JR.
Acting Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

Section 106 of the Act of October 27, 1986, Pub. L. No. 99-546, 100 Stat. 3052, requires the Secretary of the Interior to include in each new or amended contract for the delivery of water from the Central Valley Project provisions ensuring that the United States recoups operation and maintenance deficits incurred under prior water service contracts. The questions presented are:

1. Whether Section 106 deprives petitioner, an irrigation district that seeks to renew a water delivery contract, of vested rights protected by the Fifth Amendment.

2. Whether the Secretary of the Interior violated petitioner's contractual rights by proposing a renewal contract that would allow the Secretary to modify the contract in response to a review under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, and consultation under the Endangered Species Act, 7 U.S.C. 1531 *et seq.*, but would reserve to petitioner all existing rights to challenge the legality and validity of any such modifications.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A1-A22) is reported at 985 F.2d 1397. The opinion of the district court (Pet. App. B1-B29) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1993, and amended on March 8, 1993. A petition for rehearing was denied on March 29, 1993. The petition for a writ of certiorari was filed on April 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States has constructed and operates numerous reclamation projects, which provide water for crop irrigation and other uses in the arid western States. The Central Valley Project (CVP) in California is the largest of those projects. One of the principal CVP facilities is Friant Dam, located on the San Joaquin River near Friant, California. That dam created Millerton Lake, from which waters are diverted into the Madera and Friant-Kern Canals. The Madera Canal services petitioner Madera Irrigation District and the Chowchilla Water District. See generally *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279-283 (1958).

In 1939, prior to construction of Friant Dam, petitioner and the United States (acting through the Department of the Interior's Bureau of Reclamation) entered into a contract pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 391 *et seq.*, and "acts amendatory or supplementary thereto." See Pet. App. B2-B3. The 1939 Contract recited that petitioner had earlier obtained property rights to the site of the then-contemplated Friant Dam, as well as certain water rights, and that petitioner was willing to convey those rights to the United States in return for petitioner's receiving a supplemental water supply from Friant Dam. See *id.* at A2-A3.

Article 14 of the 1939 Contract addressed petitioner's right to purchase CVP water. Article 14(a) stated that Madera "shall be entitled * * * to purchase a supplemental supply of water from Friant Dam and Reservoir" in a designated average annual maximum amount. Pet. App. B3 n.2. Article 14(e) additionally stated in relevant part:

> Whenever the United States shall be prepared to furnish service for irrigation or other purposes from Friant Reservoir and at a date not later than that upon which water shall be offered for sale to any prospective water user, the United States shall notify the District in writing relative to the availability and character of such service, and shall define the classes and quantities of service then and thereafter to be made available and the respective prices and methods of payment therefor. * * * It is mutually understood between the parties hereto that it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dam and Reservoir.

Gov't Supp. Exc. Rec. 92.

In 1951, following construction of the Friant Dam and the Madera Canal, petitioner and the United States entered into a contract pursuant to the federal reclamation laws. The 1951 Contract's explanatory recitals noted that the parties had previously entered into the 1939 Contract "under the terms of which [petitioner], subject to the terms and conditions therein set forth, became entitled to purchase from Friant Dam and Reservoir * * * a permanent supplemental supply of [water]." Gov't Supp. Exc. Rec. 98. Part A of the 1951 Contract (Articles 3 through 11) contained water service provisions in accordance with Section 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(e), and provided for the delivery of

CVP water to petitioner through the Madera Canal. Gov't Supp. Exc. Rec. 105-118.[1]

Article 3 of the 1951 Contract provided that Part A would "remain in effect for a period of forty (40) years commencing with the year in which the initial delivery date occurs." Gov't Supp. Exc. Rec. 105. Article 4 recognized that "[t]he executory portions of the 1939 Contract [as modified and amended] remain and shall remain in full force and effect, and the parties, upon the expiration of the term of Part A hereof, shall be entitled to all of the rights conferred upon them by article 14 of the 1939 contract and shall be subject to all of the terms and conditions of said article." Gov't Supp. Exc. Rec. 105. Article 4 further stated that "[u]nder this Part A and under the succeeding contracts the rates to be charged the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir." *Id.* at 106. See Pet. App. A9.

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[1] Section 9(e) authorizes the Secretary of the Interior to enter into long-term and short-term contracts to furnish federal reclamation project water for irrigation purposes. Section 9(e) states that water service contracts shall be for periods not to exceed forty years and shall be "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation." 43 U.S.C. 485h(e). Congress recently revised the application of Section 9(e) to CVP water service contracts. See Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3404, 106 Stat. 4708-4709.

Article 5 of the 1951 Contract provided for annual delivery to petitioner of up to 85,000 acre-feet of "Class One" water and a maximum of 186,000 acre-feet of "Class Two" water. Gov't Supp. Exc. Rec. 107. (Class One water comprises a more dependable source of supply than Class Two water). Article 7(a) stated that the maximum rate of payment for Class One water shall be $3.50 per acre-foot and the maximum rate of payment for Class Two water shall be $1.50 per acre-foot. Pet. App. A3.

2. Part A of the 1951 Contract was scheduled to expire on February 29, 1992. As that date approached, the parties commenced negotiations for a renewal contract. Pet. App. A4. The parties, however, were unable to reach an agreement, and petitioner initiated this suit. Petitioner's amended complaint acknowledged that the Secretary of the Interior had offered a renewal contract. Petitioner alleged, however, that the proposed renewal contract contained various provisions that violated petitioner's rights under the 1939 and 1951 contracts. Gov't Supp. Exc. Rec. 1.

Petitioner objected to the Secretary's proposed water service charges, which the Secretary had formulated in accordance with legislation enacted after the parties entered into the 1951 Contract. Specifically, Section 106 of the Act of October 27, 1986, Pub. L. No. 99-546, 100 Stat. 3052, states:

> The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley project water contractor in the payment of operation and maintenance costs of the Central

> Valley project is repaid by such contractor under the terms of such new or amended contract, together with interest on any such deficit which arises on or after October 1, 1985, at a rate equal to the average market yields on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the applicable reimbursement period of the project, adjusted to the nearest one-eighth of 1 percent.

The charges that petitioner had paid for water under the 1951 Contract were inadequate to repay the government for the annual operation and maintenance costs (O&M costs) that were allocable to petitioner and incurred while that contract was in effect. See Pet. App. A6, B21. See generally *Nampa & Meridian Irrigation District* v. *Bond*, 268 U.S. 50, 53 (1925) (describing O&M costs). The Secretary accordingly included cost provisions in the proposed renewal contract sufficient to recapture that deficit, as well as to repay annual O&M costs in future years. Petitioner asserted that the charges required by Section 106 would deprive it of contractual property rights in violation of the Fifth Amendment of the United States Constitution.

Petitioner also objected to portions of the proposed Article 14(c) of the contract. That provision explains, *inter alia*, that the Secretary is preparing an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, and is also undertaking consultation pursuant to Section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536, concerning, among other things, the renewal of water service contracts for the Friant Unit of the CVP. The proposed Article 14(c)

provides that the contracting parties agree that the contract is subject to modification by the United States in accordance with the final EIS and the ESA consultation, but reserves petitioner's rights "to challenge the legality and the validity of any such modifications." Pet. App. B6-B7 n.8. Petitioner contended that this proposed provision also violated its Fifth Amendment rights.

3. The government and various intervenors moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted the motions to dismiss, Pet. App. B1-B29, and the court of appeals affirmed, *id.* at A1-A22.

The court of appeals determined that Section 106's requirement that new and amended contracts include rates that recoup past O&M deficits did not violate petitioner's contractual rights, because neither the 1939 Contract nor the 1951 Contract established a set rate at which water must be offered to petitioner in a renewal contract. Pet. App. A11-A12. The court rejected petitioner's contention that the O&M recoupment provision amounted to a retroactive adjustment of the rates established and paid under the 1951 Contract. As the court explained: "The means by which the price of new water will be established looks retroactively at the costs of supplying the old water, but [petitioner] could not be forced to pay the money in the absence of a renewal contract, so it is a charge for new water calculated on the basis of the old water, rather than an additional charge for the old water." *Id.* at A12.

Next, the court of appeals addressed petitioner's assertion that the O&M recoupment provision would result in petitioner's paying higher rates for water service than other Friant Unit contractors, allegedly

in violation of the 1939 and 1951 Contracts, which state that petitioner shall not be charged costs or rates for water service in excess of charges made to others for the same class of water and service from Friant Dam and Reservoir. The court rejected that argument. It explained that all water contractors are subject to the O&M recoupment provision, that the variation in rates among contractors reflected differences in the service provided, and that the United States had not surrendered its "sovereign authority to charge more for water service with a higher operation and maintenance cost." Pet. App. A13-A15.

Finally, the court of appeals rejected petitioner's contention that Article 14(c) of the proposed renewal contract would render the contract a nullity and thus breach petitioner's right to enter into a renewal contract. The court suggested that if the government reserved an unlimited right to modify the contract, that reservation would render the proffered contract illusory. The court concluded, however, that Article 14(c) did not have that effect, because it expressly preserves any rights that petitioner may have to challenge the legality and validity of any resulting modifications. Pet. App. A16-A19.

ARGUMENT

1. Petitioner challenges Section 106 of the Act of October 27, 1986, on the ground that it deprives petitioner of "vested contract rights under the Fifth Amendment." Pet. 13-22. The court of appeals correctly rejected that argument based on its reading of the contracts at issue. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals, and its construction of the

particular contracts at issue here does not otherwise warrant review.[2]

a. Petitioner argues (Pet. 15-19) that the Section 106 requirement that any renewal contract offered to petitioner must provide for the recoupment of O&M deficits incurred under previous water service contracts is a unilaterally imposed increase of the prices charged for the water that petitioner had received under the 1951 Contract. Neither the 1939 Contract nor the 1951 Contract, however, precludes the government from setting the water rates in a renewal contract at a level that will recoup the O&M cost deficit incurred by the government under the 1951 Contract.

The 1939 Contract did not set any price for water service, but left the price to be determined at a future date. Indeed, Article 14(e) explicitly acknowledged that "it is not possible at this time to fix a price to be paid by [petitioner] for said water." Pet. App. B3 n.3. The 1951 Contract established a maximum rate of $3.50 per acre-foot for Class One water and of $1.50 per acre-foot for Class Two water, but those rates applied only to the forty-year term of that contract, which expired on February 29, 1992. Petitioner has not pointed to any provision of either contract that precludes the government from setting water rates in a renewal contract at a level sufficient to allow the

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[2] Petitioner asserts (Pet. 23-27) that the court of appeals' decision in this case conflicts with that court's earlier decision in *Alpine Ridge Group* v. *Kemp*, 955 F.2d 1382 (9th Cir. 1992). This Court, however, recently reversed the court of appeals' *Alpine Ridge* decision. See *Cisneros* v. *Alpine Ridge Group*, 113 S. Ct. 1898 (1993). In any event, the Court does not ordinarily grant review to resolve an intra-circuit conflict.

government to recoup O&M deficits incurred under previous contracts.

As the court of appeals correctly explained, the revised water rates are prospective and have no effect on petitioner's past contract, which provided petitioner with a substantial subsidy at taxpayer expense. Congress's decision to set future rates in light of past O&M deficits affects only future obligations under the renewal contract. If petitioner is dissatisfied with the revised water service rates, petitioner remains free to decline to enter into a renewal contract. Pet. App. A11-A13.

b. Petitioner also maintains (Pet. 19-22) that Section 106's requirement that the Secretary recoup petitioner's existing O&M deficit through the imposition of proportionally higher rates in a renewal contract violates provisions of the 1939 Contract and 1951 Contract stating that petitioner's water charges in succeeding contracts shall not exceed charges made to others for "the same class of water and service" from Friant Dam and Reservoir. Section 106, however, does not subject petitioner to discriminatory charges.

Section 106 directs that all water contractors that desire to continue receiving water from the Friant Reservoir are obligated to pay future water rates reflecting their allocable O&M costs. Thus, all of those contractors are treated equally with respect to recoupment of O&M deficits. The fact that Section 106 results in petitioner's paying higher charges than other water users simply reflects that petitioner does not receive the "same class of water and service." As the court of appeals noted, "[s]ervice requiring more expensive operation and maintenance is different from

service requiring less expensive operation and maintenance." Pet. App. A14.

As the court of appeals also pointed out (Pet. App. A7), government contracts must be construed, wherever possible, to avoid foreclosing the exercise of sovereign authority, and sovereign power will remain intact "unless surrendered in unmistakable terms." *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986), quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). Here, the contractual language relied upon by petitioner does not unequivocally surrender Congress's sovereign authority to provide for full recoupment of the government's previously incurred O&M costs, as required by Section 106 of the 1986 Act.

2. Finally, petitioner contends (Pet. 22-23) that Article 14(c) of the proposed renewal contract renders that contract a legal nullity, thus violating petitioner's right to be offered a renewal contract. Petitioner asserts that "[t]he government cannot reserve to itself an unlimited right to escape its contractual obligations 'without rendering its promises illusory and the contract void'" (Pet. 23, quoting *Torncello* v. *United States*, 681 F.2d 756, 760 (Ct. Cl. 1982)). The court of appeals correctly rejected that argument (Pet. App. A17-A19), because Article 14(c) does not purport to confer upon the government an unlimited right to modify the renewal contract. Indeed, Article 14(c) expressly reserves to petitioner all of its currently existing rights to challenge the legal validity of any modification that the government might subsequently make as a consequence of the EIS and the ESA consultation process. Accordingly,

it does not offend petitioner's right to be offered a renewal contract to purchase CVP water.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

PETER R. STEENLAND, JR.
Acting Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

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